

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

SCOTT SYVERSON,

Appellant,

v.

STATE LOTTERY COMMISSION,

Respondent.

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Case No. SUSP-01-0040

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND ORDER OF THE BOARD

**I. INTRODUCTION**

**1.1 Hearing.** This appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair, and RENÉ EWING, Member. The hearing was held on September 18, 2002, in Yakima, Washington, and September 30, 2002, in Olympia, Washington. WALTER T. HUBBARD, Chair, did not participate in the hearing or in the decision in this matter.

**1.2 Appearances.** Appellant Scott Syverson was present and was represented by Edward E. Younglove III, Attorney at Law, of Parr & Younglove, P.L.L.C. Lawrence L. Paulsen, Assistant Attorney General represented Respondent Washington State Lottery Commission.

**1.3 Nature of Appeal.** This is an appeal from a disciplinary sanction of a suspension for one workweek for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or Department of Personnel rules and regulations. Respondent alleged that Appellant lost his temper and behaved in an inappropriate, unprofessional and disrespectful manner when he yelled at his supervisor.

1.4 **Citations Discussed.** WAC 358-30-170; Baker v. Dep't of Corrections, PAB No. D82-084 (1983); McCurdy v. Dep't of Social & Health Services, PAB No. D86-119 (1987); Countryman v. Dep't of Social and Health Services, PAB No. D94-025 (1995); Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994); Rainwater v. School for the Deaf, PAB No. D89-004 (1989); Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

## II. FINDINGS OF FACT

2.1 Appellant Scott Syverson is a District Sales Representative (DRS) and permanent employee for Respondent State Lottery Commission in Region 2. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on November 21, 2001.

2.2 Appellant has been employed with the Lottery Commission since 1990. Appellant had a history of counselings, letters of expectations and letters of reprimand. Between March 19, 2001 and August 3, 2001, Appellant received four letters of expectations or counseling, including a letter of counseling for inappropriate conduct toward agency managers during a meeting with outside vendors, and two letters of reprimand for, in part, unprofessional conduct toward his supervisor.

2.3 By letter dated November 9, 2001, Acting Director Robert Benson notified Appellant of his suspension without pay for one workweek, effective November 26, 2001 and ending November 30, 2001, for neglect of duty, insubordination, gross misconduct and willful violation of published employing agency or Department of Personnel rules and regulations. Mr. Benson alleged that during a September 11, 2001, telephone conversation with his supervisor, Don Rossow, Appellant lost his temper and yelled at Mr. Rossow and told him he wasn't qualified to do his job.

1 2.4 Appellant works out of the Region 2 Yakima office and is assigned a sales territory that  
2 covers the Toppenish, Tri-Cities and Yakima Valley areas. Appellant's territory includes  
3 approximately 96-100 retailers. The retailers receive service from Appellant and also from contract  
4 vendors (business partners) who provide services such as maintenance and installation of lottery  
5 sales equipment. In addition, other lottery employees such as auditors and management  
6 representatives occasionally visit retailers.

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8 2.5 One of the retailers in Appellant's area was Horse Heaven Hills Travel Plaza (HHH).  
9 Gilbert Gomez, a telemarketer for Lottery's Yakima office talked to Michelle Bender, the office  
10 manager for HHH, on September 10, 2001. Ms. Bender asked him about a \$90 charge to the store  
11 that she felt was an error. Mr. Gomez reviewed HHH's file but could not determine the basis for the  
12 \$90 charge. Therefore, he transferred Ms. Bender to the customer service office in Olympia. The  
13 customer service office referred Ms. Bender to GTech, the Lottery business partner responsible for  
14 installing the sales equipment in HHH. GTech determined that the charge was for a Silicone  
15 Avalanche Diode (SAD) unit. Mr. Gomez left a written message and a voice message for Appellant  
16 about the situation.

17  
18 2.6 On September 11, 2001, Appellant received the message from Mr. Gomez. Appellant  
19 contacted Ms. Bender and told her that he would look into it and get back to her. Appellant knew  
20 that the SAD unit at HHH had been installed and paid for several years earlier. Appellant asked  
21 Kathy Poulin, Lead Secretary in the Yakima office, to try to resolve the issue. Ms. Poulin received  
22 the paperwork that she felt she needed to resolve the problem. However, Mr. Rossow approached  
23 her and directed her to stop working on the problem. Mr. Rossow said that he would take care of it.  
24 Ms. Poulin did not tell Mr. Rossow that she was close to resolving the issue.

1 2.7 Gordon Zulauf, a customer service representative for GTech, contacted Mr. Rossow. Mr.  
2 Rossow told Mr. Zulauf that there was a problem with a SAD unit. Mr. Zulauf went to the Yakima  
3 office to show Mr. Rossow the paperwork he had for the unit. However, the paperwork Mr. Zulauf  
4 had was not for the SAD unit at HHH. Mr. Rossow and Mr. Zulauf decided to go to HHH and try  
5 to resolve the problem.

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7 2.8 Mr. Rossow called Appellant and left him a voice message. Mr. Rossow informed  
8 Appellant that he was going to HHH at 3 p.m. to investigate the problem and invited Appellant to  
9 meet him there. Mr. Rossow and Mr. Zulauf drove separate cars to HHH.

10  
11 2.9 After determining that the SAD at HHH was not newly installed, Mr. Rossow and Mr.  
12 Zulauf decided to check another retailer in the area to see if the SAD had been installed there but  
13 mistakenly charged to HHH. Rather than driving two cars to the second retailer, Mr. Zulauf rode  
14 with Mr. Rossow. Mr. Rossow and Mr. Zulauf discovered that the SAD unit that was charged to  
15 HHH had been installed at the second retailer.

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17 2.10 Mr. Rossow and Mr. Zulauf returned to HHH. Before Mr. Zulauf got out of Mr. Rossow's  
18 car, Mr. Rossow received a cellular telephone call from Appellant. Mr. Zulauf could hear the tone  
19 of Appellant's words and the volume of his voice, but he could not understand the exact words that  
20 Appellant was saying.

21  
22 2.11 Mr. Zulauf credibly testified that Mr. Rossow's voice remained calm during the conversation  
23 but that Appellant's voice became increasingly louder until Appellant was yelling. Mr. Zulauf was  
24 uncomfortable witnessing this call because Appellant sounded upset.

1 2.12 After Mr. Zulauf returned to the GTech office, he reported the error at HHH and the incident  
2 with Appellant to his supervisor. In addition, on September 13, 2001, Mr. Zulauf made a written  
3 report of the incident. Mr. Zulauf's testimony before the Board and his written statement are  
4 consistent and we find no reason to believe that he has been untruthful about this incident.  
5 Furthermore, Mr. Zulauf credibly testified that he heard Appellant inappropriately raise his voice on  
6 previous occasions and as a result, he avoided interacting with Appellant.

7  
8 2.13 Mr. Rossow reported the incident with Appellant to Mona Moberg, Assistant Sales  
9 Manager. Ms. Moberg had previously been Appellant's supervisor and had observed him raise his  
10 voice inappropriately during meetings. In fact, on March 25, 2001, Ms. Moberg gave Appellant a  
11 letter of reprimand for his hostile and disrespectful behavior toward her on October 3, 2000. In the  
12 letter of reprimand, Ms. Moberg referenced a March 21, 2001 meeting during which Appellant  
13 challenged her authority and was disrespectful toward her. Ms. Moberg commented that Appellant  
14 failed to return her phone calls and argued with her when she gave him instructions. Ms. Moberg  
15 warned Appellant that if his unprofessional conduct continued, she would recommend that formal  
16 corrective action be taken.

17  
18 2.14 The Yakima management team informed Mr. Benson of the September 11, 2001 incident  
19 with Appellant. Mr. Benson was concerned because for over a 2 to 2 1/2 year period, he had  
20 observed a pattern developing wherein Appellant continually confronted various management team  
21 members. Mr. Benson knew that Appellant had been given written expectations, counselings and  
22 reprimands in an effort to change his behavior but determined that Appellant failed to do so.  
23 Therefore, he concluded that formal discipline was warranted. Mr. Benson considered terminating  
24 Appellant but because of problems and low morale in the Yakima office due to management  
25 changes and Mr. Rossow's management style, he decided a lesser discipline would be appropriate.  
26 By letter November 9, 2001, he informed Appellant of his suspension.

1  
2 2.15 Appellant has a reputation among the Yakima staff for challenging management. In  
3 addition, Appellant and other staff in the Yakima office have a history of filing formal complaints  
4 against management. Mr. Rossow was the subject of numerous complaints from the employees at  
5 the Yakima office and as a result, Mr. Rossow was removed from his position. Appellant and Mr.  
6 Rossow did not have a good working relationship. In addition, Appellant had conflicts with his  
7 prior supervisors and has conflicts with his current supervisor, who was previously his co-worker.

### 8 9 **III. ARGUMENTS OF THE PARTIES**

10 3.1 Respondent argues that Appellant lost his temper, raised his voice, and behaved in a loud,  
11 inappropriate, unprofessional and reckless manner toward Mr. Rossow. Respondent contends that  
12 Mr. Zulauf's testimony was credible and he had no reason to fabricate his version of the incident.  
13 Respondent asserts that Appellant's behavior toward Mr. Rossow was consistent with his ongoing  
14 pattern of inappropriate behavior toward his previous supervisors. Respondent contends that the  
15 inappropriate behavior of Mr. Rossow did not justify Appellant's insubordinate behavior or mitigate  
16 his duty to be respectful to his superior. Respondent argues that the appointing authority took the  
17 issues surrounding Mr. Rossow's behavior into consideration in determining the level of sanction to  
18 impose on Appellant and determined that rather than dismissing Appellant, a lesser form of  
19 discipline was appropriate. Respondent argues that in light of Appellant's ongoing history of  
20 similar misconduct, his continued misconduct warranted a one-workweek suspension without pay.

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22 3.2 Appellant denies raising his voice or yelling at Mr. Rossow during the September 11, 2001  
23 telephone conversation. Appellant contends that Mr. Rossow was an ineffective, disrespectful  
24 manager and was hated by everyone he managed. Appellant contends that even if he had been  
25 disrespectful to Mr. Rossow, his behavior would have been justified. Appellant further contends  
26 that he had a spotless record until he filed a valid Unfair Labor Practice complaint and that since

1 that time, management has unjustly targeted him for corrective and disciplinary actions. Appellant  
2 asserts that it is unfair for Respondent to discipline him while the agency allows management to be  
3 abusive toward employees. Appellant asserts that under the totality of the circumstances the one-  
4 workweek suspension without pay was not justified and that his appeal should be granted.

#### 5 6 IV. CONCLUSIONS OF LAW

7 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter  
8 herein.

9 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
10 the charges upon which the action was initiated by proving by a preponderance of the credible  
11 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
12 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of  
13 Corrections, PAB No. D82-084 (1983).

14  
15 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
16 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
17 of Social & Health Services, PAB No. D86-119 (1987).

18  
19 4.4 Insubordination is the refusal to comply with a lawful order or directive given by a superior  
20 and is defined as not submitting to authority, willful disrespect or disobedience. Countryman v.  
21 Dep't of Social and Health Services, PAB No. D94-025 (1995).

22  
23 4.5 Respondent has met its burden of proof that Appellant neglected his duty and was  
24 insubordinate during the September 11, 2001 telephone call during which he yelled at his supervisor  
25 and more likely than not told him he was not qualified to do his job. Regardless of the negative  
26

1 work environment in the Yakima office, Appellant neglected his duty when he failed to treat his  
2 supervisor with respect and to act professionally. Misconduct by others does not mitigate  
3 Appellant's duty to behave in a professional and respectful manner toward his superiors.  
4 Furthermore, Appellant had received numerous corrective actions and was on notice that his  
5 continued disrespectful and unprofessional behavior toward his superiors was inappropriate. Yet,  
6 Appellant continued to engage in inappropriate behavior

7  
8 4.6 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
9 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

10  
11 4.7 Willful violation of published employing agency or institution or Personnel Resources  
12 Board rules or regulations is established by facts showing the existence and publication of the rules  
13 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
14 rules or regulations. A willful violation presumes a deliberate act. Skaalheim v. Dep't of Social &  
15 Health Services, PAB No. D93-053 (1994).

16  
17 4.8 Respondent has failed to meet its burden of proof that Appellant's actions rose to the level of  
18 gross misconduct or that he willfully violated agency rules or regulations. Respondent failed to  
19 establish that Appellant's behavior toward Mr. Rossow on September 11, 2001 adversely impacted  
20 the agency's ability to carry out its functions. In addition, Respondent failed to prove that Appellant  
21 violated any published agency or department of personnel rules, regulations, policies or procedures.

22  
23 4.9 In determining whether a sanction imposed is appropriate, consideration must be given to  
24 the facts and circumstances including the seriousness and circumstances of the offense. The penalty  
25 should not be disturbed unless it is too severe. The sanction imposed should be sufficient to prevent



1 recurrence, to deter others from similar misconduct, and to maintain the integrity of the program.  
2 An action does not necessarily fail if one charge is not sustained unless the entire action depends on  
3 the unproven charge. Holladay v. Dep't of Veteran's Affairs, PAB No. D91-084 (1992).

4  
5 4.10 Appellant's behavior was clearly inappropriate, but it did not rise to the level of gross  
6 misconduct. Furthermore, Respondent failed to prove that Appellant violated any published rules  
7 or regulations. Therefore, after considering the totality of the proven facts and circumstances, the  
8 disciplinary sanction should be modified to a three-day suspension without pay.

9  
10 **V. ORDER**

11 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Scott Syverson is modified to  
12 a three-day suspension without pay.

13 DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2002.

14 WASHINGTON STATE PERSONNEL APPEALS BOARD

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Gerald L. Morgen, Vice Chair

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René Ewing, Member

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